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No. 91-915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ISCA ENTERPRISES, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., RO-MALIK ENTERPRISES, LTD., 441-445 EAST 116TH ST., INC., DIAMOND PROPERTIES, INC.,
Petitioners,

v.

THE CITY OF NEW YORK, FELICE MICHETTI, as Commissioner of Housing Preservation and Development, CAROL O'CLEIREACAIN, as Commissioner of Finance of the City of New York,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITIONERS' REPLY BRIEF

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York[1]

PETITIONERS' REPLY MEMORANDUM

INTRODUCTION

Respondents concede that the constitutional adequacy of statutes limiting notice of tax foreclosure actions to persons who have affirmatively requested notice is an issue that this Court reserved in *Men-*

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[1] Notwithstanding the respondents' caption, this case seeks review of a decision of the New York Court of Appeals.

nonite Board of Missions v. Adams, 462 U.S. 791 (1983), and that numerous state and federal appellate courts have held that notice-by request schemes do not comport with due process. Moreover, respondents do not—and cannot—deny that the New York Court of Appeals explicitly reached and decided a federal constitutional issue when it rejected the due process challenge to the application of the notice-by-request provisions of the New York City Administrative Code to five of the petitioners in this case. However, despite their apparent recognition of the importance of the issue reserved in *Mennonite Board of Missions* and of the divergent results lower courts have reached in applying *Mennonite Board*'s due process analysis to notice-by-request statutes, respondents ask the Court to bypass the issue in this case. None of the reasons respondents advance has merit.

ARGUMENT

1. Owners Are Also Entitled to Constitutionally Adequate Notice.—Respondents contend that, with respect to the five petitioners whose due process claims were explicitly considered and rejected by the New York court, the issue presented is not precisely the same as that addressed by the other courts that have rejected the constitutionality of notice-by-request statutes. Respondents stress that the five petitioners in this case were *owners* of the foreclosed property, while the parties in the cases that have struck down notice-by-request statutes were all *mortgagees* or other lienholders.

Respondents' observation, while factually accurate, does not remotely serve to distinguish the cases. Clearly, if notice-by-request is not adequate for mort-

gagees, it follows *a fortiori* that it does not suffice for owners, whose constitutionally protected property interest is even greater. Thus, respondents' contention that this case does not present the issue reserved in *Mennonite Board* and decided in the state and federal cases striking down notice-by-request statutes is false.[2]

Respondents further contend that, as to owners, the New York City code is distinguishable from the statutes struck down by other courts in that it provides an additional avenue of notice: namely, the mailing of notice to the name and address listed in the latest annual record of assessed valuations. Again, however, this is not a genuine distinction. It is undisputed that this procedure did not, in this case, result in notice being mailed to the current owners of the property. The New York court rationalized this lack of notice by stating that it was *up to the owners* to "maintai[n] current records" and "update their [*i.e.*, the City's] records." Pet. App. 11a.

In other words, the lower court placed on the owners the obligation to take affirmative action to ensure that they would receive notice in the event of foreclosure. The mailing of notice only to persons listed in the record of assessed valuations is simply notice-by-request in another guise. Unless the property owner has advised the City that he is the one to

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[2] Indeed, the New York Court of Appeals itself noted that this case "presents us with an issue explicitly left open by the United States Supreme Court in *Mennonite*." Pet. App. 8a. Thus, respondents' assertion that "the *Campbell* case does not present the issue which petitioners contend was reserved for future decision by this Court in *Mennonite*" (Brief in Opp. 34) is contradicted by the very decision respondents seek to defend.

whom notice should be sent, he is not assured of notice of foreclosure even though his identity is clearly discernible from properly recorded deeds in the relevant land records.

Thus the purported "distinction" relied upon by respondents is a mere illusion. The issue decided below is precisely the same as that decided by other courts that have confronted notice-by-request statutes: "[W]hether the State may, consistent with the Constitution, prospectively shift the entire burden of ensuring adequate notice to an interested property owner regardless of the circumstances." *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 884 (5th Cir. 1989). The New York Court of Appeals' affirmative answer to that question is, as demonstrated in our petition for certiorari, contrary to the rulings of numerous other courts and presents an issue deserving of resolution by this Court.

2. There Is No Adequate and Independent State Ground.—Because the remaining petitioner, ISCA Enterprises, was a mortgagee of the foreclosed property, respondents concede that the application of New York City's notice-by-request scheme to ISCA presents, on its face, precisely the constitutional question reserved by *Mennonite Board* and subsequently addressed by the lower court decisions cited in the petition for certiorari. However, respondents contend that the New York court's ruling was based on an adequate and independent state-law ground. New York City Administrative Code § 412(c) provides that the presumption that a foreclosure was regular and in accordance with law becomes "conclusive" two years after the deed was recorded and that no action to set aside such a deed may be maintained unless

it is commenced "prior to the time that the presumption becomes conclusive."

The New York Court of Appeals itself recognized that this "conclusive presumption" could not bar an action by a party that did not have actual notice of the deed within the two-year period. (*See* Pet. App. 7a.) However, the court held that because ISCA had initiated an administrative proceeding after obtaining actual notice and then filed suit more than two years after it had such actual notice, the two-year "presumption" of Section 412(c) precluded the action. The court reached this result despite the fact that ISCA's delay in filing suit was attributable to the City's inability to determine an available administrative claim for release of the property. Through no fault of ISCA's, the process occupied more than three years. The New York court's ruling in effect requires a party who learns that its property interest has been foreclosed without notice to rush into court to assert a federal constitutional claim without availing itself of an administrative remedy that would return the property without the burdens of litigation and without the need for adjudication of constitutional issues. The penalty for failure to do so is the forfeiture of all federal challenges to the foreclosure in the event that the administrative proceeding is dragged out *by the City* for more than two years.

Contrary to respondents' contention, such a ruling is by no means an "adequate and independent" state-law basis for the rejection of ISCA's constitutional claims. *First*, the "conclusive presumption" of regularity afforded a deed obtained through procedures violating elemental due process notice requirements must fall together with the constitutional infirmity of

the deed. Such a "presumption" is not by its own terms a statute of limitations and therefore cannot possibly constitute an "adequate" state-law ground for decision insulating the underlying constitutional flaw from review. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) (rejecting constitutionality of Texas procedure creating presumption of correctness for a judgment entered without notice or other requisites of due process).

Second, even if the "conclusive presumption" of regularity relied upon by the New York court were properly characterized as a statute of limitations, such a limitation does not automatically cut off federal claims but is only "borrowed" for such purposes *to the extent that it is consistent with federal policy*. *See, e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980).[3] Where a state statute of limitations unreasonably inhibits the assertion of a federal claim or is otherwise inconsistent with important federal policies, this Court has not hesitated to reject its application to federal claims. *See, e.g., Burnett v. Grattan*, 468 U.S. 42 (1984) (rejecting application of six-month statute to claims under 42 U.S.C. § 1983).

Here, the application of the state statute to foreclose ISCA's federal claim simply because of delays resulting from the the City's own tardiness in resolving ISCA's request for administrative relief is clearly contrary to federal policy. Federal policy favors the avoidance of federal constitutional claims as

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[3] This analysis applies equally to federal claims brought in state courts as to such claims in federal court. *See, e.g., Mitchell v. Clark*, 110 U.S. 633 (1884); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

well as of needless litigation. These policies are obviously served by utilization of an administrative remedy that would, if successful, prevent the unlawful deprivation of property and thus obviate the need for constitutional litigation.

The New York court's ruling, by contrast, has precisely the opposite effect. It transforms an available administrative remedy into a trap by subjecting those who avail themselves of it to the risk that, if their request for administrative relief is delayed, their time for judicial assertion of their federal constitutional claims will have expired. Such a result is not only unfair, but it creates incentives for litigation that conflict with sound federal policy. Accordingly, the state statute may not be "borrowed" in these circumstances to foreclose the federal claim asserted. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (holding that application of one-year state statute of limitations to Title VII claims violated federal policy favoring administrative resolution of claims); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944) (state statute of limitations not applicable to bar claims where delay resulted from pending administrative proceeding).[4]

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[4] *Board of Regents v. Tomanio, supra*, relied upon by the court below and by the respondents, is clearly distinguishable. In that case, this Court held that where a plaintiff filed a state-law-based lawsuit challenging denial of a license, the New York courts need not toll the statute of limitations on a Section 1983 action seeking equivalent relief during the pendency of the state-law action. The basis of the Court's ruling was that it did not violate federal policy for New York to enforce a rule requiring the plaintiff to litigate state and federal claims simultaneously, thus denying the plaintiff two bites at the litigation apple. Here,

Third, even if a state statute of limitations is to be borrowed for application to ISCA's federal due process claim, federal law still controls the question of when that claim accrues. *See Rawlings v. Ray*, 312 U.S. 96 (1941). While a possibility of administrative relief was available to petitioner ISCA, the deprivation of its property without due process was not yet final, and its claim had not yet ripened. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).[5] Application of a purported "statute of limitations" to foreclose a federal claim before it has become ripe as a matter of federal law cannot constitute an adequate and independent ground for the state court's decision.

CONCLUSION

Respondents' attempts to avoid the constitutional issues presented by the New York court's decision are unavailing. As to five of the petitioners, it is clear that the lower court reached the constitutional ques-

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however, the effect of the state's application of its statute is *not* to spare the state the burden of litigating the same events twice in succession. Rather, it is to *require* the plaintiff to litigate prematurely, before the conclusion of an administrative proceeding that might spare *both* parties the burden of litigating. Clearly, forcing federal issues to litigation while an avenue for avoiding litigation altogether is available is contrary to federal policy, and it is in no way required by the reasoning of *Tomanio*.

[5] Contrary to respondent's contention (which is not supported by any citation of authority), the ripeness analysis of *Williamson County* has been applied not only to takings claims, but also to claims of procedural due process violations such as that advanced by ISCA. *See Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988), *cert. denied sub nom. Alter v. Schroeder*, 488 U.S. 891 (1988); *Herrington v. County of Sonoma*, 857 F.2d 567, 569, n.1 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

tion of the adequacy of a notice-by-request statute. Only as to one petitioner is there a suggestion of an adequate and independent state-law ground, and, as has been demonstrated, that ground cannot withstand analysis. Accordingly, for the foregoing reasons as well as those set forth in the petition for a writ of certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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